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Supreme Court, U.S.
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NO. 04-041205

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2004

JAMES J. CLANCY, acting as a Private Attorney General and for himself,
PETITIONER

v.

A.T.&T. CORP., a New York Corporation; **COMCAST CORP.**, a Pennsylvania Corporation; and **COMCAST OF CALIFORNIA VII, INC.**, a Washington Corporation,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION ONE

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case raises important, recurring questions relating to the interaction of federal law with state consumer laws. **California Business & Professions Code §§ 17200 *et seq.*** makes actionable as an "unfair business practice" any business act or practice that violates a federal or state law.

1. With respect to cable television, does federal law ban the transmission by cable operators of obscene programming, even to "consenting adults"?

2. Where violations of federal or state obscenity law are actionable in a state civil lawsuit, did the State Court refusal to determine the question of obscenity raised by the Complaint violate petitioner's federal Constitutional right to **Due Process of Law** or **Equal Protection of the Law**?

3. In sustaining a demurrer and dismissing a civil complaint based upon alleged violations of state and federal obscenity laws as factually insufficient to state a cause of action, has petitioner's right to federal **Due Process of Law** or **Equal Protection of the Law** been violated, where both the state trial and appellate courts have:

> **(1)** refused to review videotaped copies and **Time and Motion Studies** of cable television programming contested to be obscene, which were pleaded by incorporation and filed contemporaneously with the civil obscenity complaint in accordance with State Procedural Law, and
>
> **(2)** refused to grant petitioner/plaintiff a hearing on the issue of the obscenity ***vel non*** of said programming to determine whether said programming was ***per se*** obscene (as a matter of Law)?

PARTIES TO THE PROCEEDINGS

Petitioner is James J. Clancy, as a Private Attorney General on behalf of the People of the State of California, and for himself.

Respondents are A.T.&T. Corp., a New York Corporation; and both Comcast Corp., a Pennsylvania Corporation, and Comcast of California VII, a Washington Corporation.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 2

Constitutional and statutory provisions involved 2

Statement 7

Reasons for granting the petition 9

I. The specifically named examples of Respondents' cable television programming, lodged with the State Court and incorporated by reference within petitioner's complaint, were obscene under federal Constitutional standards, and their transmission over cable television violated federal law 9

II. The California Courts denied Petitioner's federal Constitutional right to a judicial forum in which to adjudicate the questions raised by his complaint 12

III. The questions are ripe for review 13

Conclusion 16

TABLE OF AUTHORITIES

Pages

Cases:

Busch et al. v. Projection Room Theater,
44 Cal.App.3d 56 (1976) 13

Cel-Tech Communications, Inc., v. Los Angeles Cellular Telephone Co., 20 Cal.4th 163, 180 (1999) 7

Boddie v. Connecticut, 401 U.S. (1971) 12

Dunn v. Blumstein, 405 U.S. 330 (19__) 11

Fiske v. Kansas, 274 U.S. 380 (1927) 8

Jacobellis v. Ohio, 378 U.S. 184 (1964) 8

Jenkins v. Georgia, 418 U.S. 153 (1974) 12

Miller v. California, 413 U.S. 15 (1973) 8, 10, 15, 16

M.L.B. v. S.L.J., 519 U.S. 102 (1996) 10

Monroe Communications Corp. v. FCC,
900 F.2d 351 (1990) 14

New York v. Ferber, 458 U.S. 747 (1982) 8

Paris Adult Theatre I, et al. v. Slaton,
413 U.S. 49 (1973) 10, 11

People v. E.W.A.P.,
106 Cal. App. 3d 315 (1980) 5, 7

People ex rel. Busch v. Projection Room Theater,
17 Cal.3d 42, 130 Cal. Rptr. 328 (1976) 6, 13

People ex rel. Busch v. Projection Room Theater,
16 Cal.3d 350 (vacated)(1976) 13

People v. Noroff,
58 Cal. Rptr. 172 (1967) 11

People v. Noroff,
67 Cal.2d 791 (1967) 11

Phalen v. Commonwealth of Virginia,
49 U.S. 163 at 168 (1850) 15

Playboy Enterprises, Inc. V. P.S.C. of Puerto Rico,
698 F.Supp. 401 (D.Puerto Rico 1988) 4

Reno v. ACLU,
521 U.S. 844 (1973) 16

Roth v. United States,
354 U.S. 476 (1957) 16

Smith v. United States,
431 U.S. 291 (1977) 11

State of Nebraska v. Harrold,
256 Neb. 829 (1999), *cert. denied*
January 24, 2000, 2000 U.S. LEXIS 921 10

State of Texas v. Synchronal Corporation et al.,
800 F.Supp. 1456 (1992) 3

Stevens v. Superior Court,
75 Cal.App.4th 594, 602 (1999) 7

Stop Youth Addiction, Inc. v. Lucky Stores, Inc.,
17 Cal. 4th 553 (1998) 7

Tennessee v. Lane, 541 U.S. 509 (2004) 11, 12

Constitution and statutes:

U.S. Const.:
Article I, § 8 2
Article VI 3
Amend. I 2, 12
Amend. XIV ..... *passim*

47 U.S.C.:
§ 552 3
§ 558 ..... 3, 4, 10
§ 559 ..... 4, 10

18 U.S.C.:
§ 1464 10
§ 1466 ..... 4, 10
§ 1468 ..... 4, 5, 10

California Business & Professions Code:
§ 17200 *et seq.* 5, 6, 7, 8
§ 17202 6

California Civil Code:
§ 3479 6
§ 3480 ..... 6, 7

California Penal Code,
§ 311 5
§ 311.2 5
§ 370 6
§ 371 6

Miscellaneous:

Cline, Victor B., Ph.D.,"Pornography's Effects on Adults and Children," (visited February 15, 2005) <http://www.moralityinmedia.org > 14

Cline, Victor B., Ph.D.,"Treatment and Healing of Sexual and Pornographic Addictions," (visited February 15, 2005) <http://www.moralityinmedia.org > 15

Oddone-Paolucci, E., Genius, M, and Violato, C., "A Meta-analysis of the Published Research on the Effects of Pornography," Medicine, Mind and Adolescence, Vol. XII, no. 1-2, pp 101-112 (1997) 14

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IN THE SUPREME COURT OF THE UNITED STATES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION 1.

PETITION FOR A WRIT OF CERTIORARI

James J. Clancy, as a Private Attorney General on behalf of the People of the State of California, and himself, respectfully petitions for a writ of certiorari to review two related judgments [No. **B 168827** and **B 171529**] considered concurrently by the California Court of Appeal, Second Appellate District, Division One, in this case, in connection with orders dismissing petitioner's complaint, filed October 4, 2002, without leave to amend.

OPINIONS BELOW

The orders of the California Supreme Court denying a

hearing in **B168827** (**App. A, *infra.***) and **B171529** (**App. B, *infra.***) were filed on November 17, 2004. The opinion of the California Court of Appeal in **B168827**, 2004 Cal. App. Unpub. LEXIS 7996 (August 31, 2004, filed) (**App. C, *infra***), and **B171529**, 2004 Cal. App. Unpub. LEXIS 7998 (August 31, 2004, filed) (**App. D, *infra.***), were unreported.

JURISDICTION

The judgment of the California Court of Appeal in both **B168827** and **B171529** was entered on August 31, 2004. A petition for hearing in **B168827** was denied and entered on November 17, 2004 (**App. A, *infra.***). A petition for hearing in **B171529** was denied and entered on November 17, 2004 (**App. B, *infra.***). The jurisdiction of this Court is invoked under **28 U.S.C. § 1257**. The controlling issue in the state court case involves federal issues arising under the United States Constitution and under federal obscenity laws and treaties.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides: "Congress shall make no law * * * abridging the freedom of speech, or of the press." **The Fourteen Amendment to the United States Constitution** provides in relevant part that

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; no shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. The Federal Commerce Clause, Article 1, § 8 states: "The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian

tribes."

3. The Federal Supremacy Clause, Article VI of the United States Constitution states:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

4. 47 U.S.C. §552(d)(1) states:

> "Nothing in this title [47 USCS §§ 521 *et seq.*] shall be construed to prohibit any State or any franchising authority from enacting or enforcing any consumer protection law, to the extent not specifically preempted by this title [47 USCS §§ 521 *et seq.*]." [1/]

5. 47 U.S.C. § 558 states:

> "Nothing in this subchapter shall be deemed to affect the criminal or civil liability of cable programmers or cable operators pursuant to the Federal, State, or local law of libel, slander, obscenity, incitement, invasions of privacy, false or misleading advertising, or other similar laws, except that cable operators shall not incur any such liability for any program carried on any channel designated for public, educational, governmental use or on any other channel obtained under section 532 of this title or under similar arrangements *unless the program involves obscene*

[1/] See ***State of Texas, Plaintiff v. Synchronal Corporation, Synchronal Group, Inc., et al.***, 800 F. Supp. 1456 (1992) (**47 U.S.C., §§ 552(d)(1) and 558** indicate "Congress' express purpose is to authorize, not preempt, application of state law in the realm of consumer protection in the cable television industry.")

material." [Emphasis added]. [2/]

6. 47 U.S.C. § 559 states:

"Whoever transmits over any cable system any matter which is obscene or otherwise unprotected by the Constitution of the United States shall be fined under title 18 or imprisoned not more than 2 years, or both."

7. 18 U.S.C. § 1466 states:

"Whoever is engaged in the business of selling or transferring obscene matter, who knowingly receives or possesses with intent to distribute any obscene * * * film * * * which has been shipped or transported in interstate or foreign commerce, shall be punished by imprisonment for not more than 5 years or by a fine under this title, or both."

8. 18 U.S.C. § 1468 states:

"(a) Whoever knowingly utters any obscene language or distributes any obscene matter by means of cable television or subscription services on television, shall be punished by imprisonment for not more than 2 years or by a fine in accordance with this title, or both.

"(b) * * * "distribute means to send, transmit, retransmit,

[2/] In 1992, Congress enacted **Pub.L. 102-385**, which inserted the concluding phrase ("*unless the program involves obscene material*") as an amendment to **Section 638** of the **Communications Act of 1934 (47 U.S.C. § 558)**, in order to clarify Congressional intent to made cable companies liable for carrying obscene programs on leased access channels. This amendment closed "an unforeseen loophole" in the **1984 Cable Act**, and specifically rejected and reversed the holding of ***Playboy Enterprises, Inc. v. T.S.C. of Puerto Rico***, 698 F.Supp. 401 (D.Puerto Rico 1988). Under current federal law, cable operators are liable for the transmission of obscene programming over leased access channels.

telecast, broadcast, or cablecast, including by wire, microwave, or satellite, or to produce or provide material for such distribution.

"(c) Nothing in this chapter, or the Cable Communications Policy Act of 1984, or any other provision of Federal law, is intended to interfere with or preempt the power of the States, including political subdivisions thereof, to regulate the uttering of language that is obscene or otherwise unprotected by the Constitution or the distribution of matter that is obscene or otherwise unprotected by the Constitution, of any sort, by means of cable television ro subscription services on television."

9. California Penal Code § 311.2 states:

"(a) Every person who knowingly sends or causes to be sent, or brings or causes to be brought, into this state for sale or distribution, or in this state possesses, prepares, publishes, produces, or prints, with intent to distribute or to exhibit to others, or who offers to distribute, distributes, or exhibits to others, any obscene matter is for a first offense, guilty of a misdemeanor. If the person has previously been convicted of any violation of this section, the court may, in addition to the punishment authorized in Section 311.9, impose a fine not exceeding fifty thousand dollars ($ 50,000)."

10. California Business & Professions Code § 17200 [3/]

[3/] See ***People v E.W.A.P., Inc.*** (1980, 2nd Dist) 106 Cal App 3d 315, 165 Cal Rptr 73. (The trial court erred in sustaining a demurrer to the People's complaint seeking an injunction and assessment of civil penalties for unlawful business practice as defined by **Business & Professions Code § 17200**, where the complaint alleged that defendants, a corporation and its officers, had been engaged for approximately one year prior to the filing of the complaint in commercially distributing and possessing for commercial distribution obscene matter as defined in **Pen C § 311(a)**, and specifically had distributed or

states:

> "As used in this chapter, unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code."

11. California Civil Code § 3479 states:

> " Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance." [4/]

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possessed for distribution various copies of 44 named obscene films and various copies of three named obscene magazines. Though **Business & Professions Code § 17200**, deals with "unfair competition" it is liberally construed to extend the meaning of that term to anything that can properly be called a business practice and that at the same time is forbidden by law. The complaint adequately alleged unlawful conduct as a business practice. It was not necessary additionally to allege specifically that the unlawful business practice was anti-competitive or harmful to consumers. The fact that certain conduct is a crime will not prevent the issuance of an injunction if the conduct also falls within a specific statute authorizing an injunction, and **Business & Professions Code § 17202**, specifically authorizes injunctions and civil penalties in addition to the remedies of the penal law.)

[4/] See ***People v Projection Room Theater***, 17 C3d 42, 130 Cal Rptr 328, 500 P2d 600 (1976). (For the purpose of regulation under the public nuisance statutes (**California Civ. Code, §§ 3479, 3480; Pen. Code, §§ 370, 371**), there is no satisfactory distinction which would justify differential treatment of the pictorial representations in obscene magazines and films on the one hand, and "live" performances on the other. The presentation of either may be fairly described as "indecent" and equally injurious to public morals.)

12. California Civil Code § 3480 states:

> "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." [5]

STATEMENT

This case raises important, recurring questions relating to the interaction of a state consumer law (*see* **California Business & Professions Code, §§ 17200 *et seq.)*** that

> "borrows" [6] *any* federal or state law (here: federal and state obscenity laws banning the transmission of obscene cable television programming) to give plaintiff's standing and a cause of action to prosecute the violation of said laws as an "unfair business practice."

Petitioner's obscenity lawsuit against several cable television operators, programmers, and government officials was improperly dismissed for failure to state causes of action against the named defendants. Petitioner sued the named defendants for their role in transmitting pay-per-view hardcore pornographic programming that was obscene. Petitioner's complaint asserted that the cable

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[5] See note 4, *supra.*

[6] See note 3, *supra.* **§ 17200**, dealing with unfair competition, has been liberally construed to extend the meaning of that term to anything that can properly be called a business practice and that at the same time is forbidden by law. When determining whether a practice is "unlawful," **§ 17200** "borrows" violations of other laws, and makes them independently actionable under **§17200**. ***Cel-Tech Communications, Inc., v. Los Angeles Cellular Telephone Co.***, 20 Cal.4th 163, 180 (1999). Virtually any law -- federal, state or local -- can serve as a predicate for a **§ 17200** claim. ***Stevens v. Superior Court***, 75 Cal.App.4th 594, 602 (1999). *See, also,* ***People v. E.W.A.P.***, 106 Cal. App. 3d 315 (1980), and ***Stop Youth Addiction, Inc. v. Lucky Stores, Inc.***, 17 Cal. 4th 553 (1998).

programming was obscene under state and federal obscenity laws, and thus defendants were engaging in unlawful business practices in violation of **California Business and Professions Code § 17200**. This case embodies the exceptions set forth in ***Fiske v. Kansas***, 274 U.S. 380, 385-86 (1927). This Court has made independent examination of facts that are intermingled with legal conclusions in cases arising in state court, when it is necessary in order to decide whether a person has been deprived by a state court of a right secured by the Constitution, or whether some other federal interest has been unduly subordinated by a state court (here, the federal interest negatively affected by the state court decisions includes the federal supremacy clause and the federal interest in the enforcement of federal obscenity laws banning the transmission of obscene cable television programming). Areas of state court findings that are subject to United States Supreme Court assessment include findings relating to the proper application of obscenity standards. ***Jacobellis v. Ohio***, 378 U.S. 184, 189 (1964). This Court's

> "duty to apply the applicable rules of law upon the basis of an independent review of the facts of each case * * * has been particularly true where rights have been asserted under the First Amendment guarantees of free expression"

and see ***New York v. Ferber***, 458 U.S. 747, 774 n. 28 (1982); ***Miller v. California***, 413 U.S. 15, 25 (1973).

The Record below (see 2004 Cal. App. Unpub. LEXIS 925, pp. 17-19) demonstrates that petitioner raised the issue that this case was controlled by federal obscenity law. The Court states: "In his first contention, plaintiff claims that this case is controlled by federal obscenity law and *People ex rel. Busch v. Projection Room Theater* (1976) 17 Cal.3d 42, 130 Cal. Rptr. 328." In refusing to review the videotapes and time and motion studies, the California Court states:

> "The question before the trial court was whether plaintiff stated cause of action against the named defendants. If that question could be answered without reviewing the materials provided by plaintiff, we see no reason why the trial court

should have been required to review them."

However, since the complaint's causes of action depended on establishing that the contested subject matter was obscene, the trial court could not "answer without reviewing the materials provided." The trial court was constitutionally required to review the videotapes and time and motion studies in its possession, and was obligated to determine whether the cable television programming contained therein was obscene. In conducting its ***de novo*** review, the California Court of Appeal was required to review the materials provided which had been pleaded by incorporation as part of petitioner's complaint. The state courts' refusal to conduct a proper review of the obscenity question constituted federal constitutional error.

REASONS FOR GRANTING THE PETITION

I. THE SPECIFICALLY NAMED EXAMPLES OF RESPONDENTS' CABLE TELEVISION PROGRAMMING, LODGED WITH THE STATE COURTS AND INCORPORATED BY REFERENCE WITHIN PETITIONER'S COMPLAINT, WERE OBSCENE UNDER FEDERAL CONSTITUTIONAL STANDARDS, AND THEIR TRANSMISSION OVER CABLE TELEVISION VIOLATED FEDERAL LAW.

Federal statutory law has established a national policy that clarifies the system of local, state and Federal regulation of cable television. Congress has taken control of cable television and ceded back to the local authorities certain limited powers, with the aim of achieving a nationwide uniformity of regulation. As set by Congress, this national cable television policy defines and limits the authority and "discretion" that a franchising authority may exercise through the franchise process. Local and state authorities may not legalize the transmission of cable television programming that is obscene under federal Constitutional standards.

Congress has imposed an absolute ban against the

transmission of obscene cable television programming, [7] but permits the states to prosecute obscene cable television under state law, as long as state procedures do not conflict with federal law. *See, for example,* ***State of Nebraska v. Harrold***, 256 Neb. 829 (1999), *cert. denied* January 24, 2000, 2000 U.S. LEXIS 921 [state criminal prosecution of obscene cable television programming].

In this case, petitioner's complaint alleged that the specifically named and identified cable television programming was "obscene ***per se***": clearly obscene under any standard, and that it violated both federal and state obscenity law. Both the trial and appellate courts refused to review the obscenity ***vel non*** of the contested subject matter, under either a federal or state Constitutional or statutory standard. With respect to the federal cable television programming laws involved, the California courts' steadfast refusal to review the obscene subject matter complaint raises the issue of the preemptive scope of federal obscenity law.

Because the Complaint specifically alleges that respondents' conduct violated federal obscenity law, the state court could not lawfully refuse to examine the obscenity ***vel non*** of the subject matter. In connection with petitioner's complaint, the state court was obliged to utilize federal Constitutional obscenity standards in making judicial determinations regarding the obscenity of the specifically named cable television programming. In addressing violations of the federal obscenity law, the state courts could not lawfully ignore the contours of federal governmental regulation enunciated in ***Miller v. California***, 413 U.S. 15 (1973) and ***Paris***

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[7] See **47 U.S.C., §§ 558 and 559** (prohibiting dissemination of "obscene or otherwise unprotected material" via cable TV). **18 U.S.C., § 1464** (prohibiting dissemination of obscene material over broadcast television operations), **§ 1468** (prohibiting dissemination of obscene material over cable or satellite operations), **§ 1466** (prohibiting commercial "engaging in business of selling or transferring obscene matter), **§ 1465** (prohibiting use of facility or means of interstate or foreign commerce). The transmission of obscene material, in a subscription TV context, has specifically been held to be contrary to the public interest. See ***Monroe Communications Corp. v. FCC***, 900 F.2d 351 (1990).

Adult Theatre I, et al. v. Slaton, 413 U.S. 49 (1973); , and their progeny. *See, for example,* ***Smith v. United States***, 431 U.S. 291 (1977) [even where a State has no obscenity law, so that no state law was violated by the mailing of sexually oriented materials to locations within the State, defendant was guilty of the federal obscenity law which prohibits the transmission of obscene materials using the mail. Here, federal law forbids the use of cable television to transmit obscene programming].

To exacerbate matters, the California Courts not only refused to apply federal obscenity law, they in effect "closed the door to the courtroom" in the face of the petitioner, by dismissing the complaint without addressing on the Record any of the substantive claims of the complaint with respect to the obscenity of the cable television programming, or petitioner's claim that said programming was transmitted in violation of state and federal obscenity law. Where obscenity is properly at issue, no state can be permitted to dismiss an obscenity complaint without actually reviewing the underlying subject matter alleged to be obscene.

Recently, this court has emphasized that the right of access to the courts is a fundamental right, and is guaranteed as a substantive right under the **Federal Constitution**. Infringement of the right to access to the courts is subject to heightened judicial scrutiny. See, e.g., ***Tennessee v. Lane***, 541 U.S. 509, 158 L.Ed. 2d 820, at 837 (2004), citing ***Dunn v. Blumstein***, 405 U.S. 330, 336, 337. However, in order to secure this "fundamental right," "access" to a judicial forum must involve a *meaningful* adjudication. The Record in this case demonstrates that such was completely absent here, where on demurrer in a case alleging violations of state and federal obscenity laws, the state courts dismissed petitioner's complaint without reviewing the obscenity ***vel non*** of the contested material under either state or federal law.

The state thus deprived petitioner of his right to a hearing to determine the obscenity ***vel non*** on the named material under the procedure described in ***People v. Noroff***, 67 Cal. 2d 791 (1967) and ***People v. Noroff***, 58 Cal. Rptr. 172 (1967). This Court has

emphasized the importance of ultimately adjudicating the obscenity ***vel non*** of the underlying subject matter, where such is a contested issue, and has recognized its special and unique role in protecting important Constitutional rights by affording, in obscenity cases, review of the question of the obscenity ***vel non***, and has even granted post-state judgment of this issue. See ***Jenkins v. Georgia***, 418 U.S.153, at 160-161 (1974).

II. THE CALIFORNIA COURTS DENIED PETITIONER'S FEDERAL CONSTITUTIONAL DUE PROCESS RIGHT TO A JUDICIAL FORUM IN WHICH TO ADJUDICATE THE QUESTIONS RAISED BY HIS COMPLAINT.

State courts cannot erect obstacles barring individuals from full participation in the federal right to a meaningful judicial adjudication of complaints lawfully filed. The **Due Process Clause** requires the states to afford certain civil litigants a "meaningful opportunity to be heard." *Cf.*, ***Tennessee v. Lane***, 158 L.Ed. 2d, at 837, citing ***Boddie v. Connecticut***, 401 U.S. 371, 379 (1971), and ***M.L.B. v. S.L.J.***, 519 U.S. 102 (1996).

This case involves important recurring questions of federal due process and equal protection regarding an individual plaintiff's right to a judicial adjudication of the obscenity ***vel non*** of material named in a complaint and alleged to be obscene, in defense of his or her complaint on demurrer, regardless of whether the individual trial or appellate jurists agree with plaintiff's viewpoint, and regardless of whether petitioner represents the defense or the prosecution.

Because of **First Amendment** concerns, before dismissing plaintiff's complaint on demurrer, both the trial judge and the appellate jurists on review (who are required by State law to review the case ***de novo***), should have: .

> **(1)** examined the complaint in its entirety, including all exhibits to the complaint, such as the **Time and Motion Studies**, attached to the complaint and pleaded by

incorporation in this case, under applicable case authority specifically recognizing such a procedure, see ***People ex rel. Busch v. Projection Room Theater, et al.***, 17 Cal.3d 42 (1976); ***People ex rel. Busch v. Projection Room Theater, et al.***, 16 Cal.3d 350 (decided March 4, 1976, and vacated June 1, 1976); and ***Busch et al. v. Projection Room Theater, et al.***, 44 Cal. App.3d 56 (1974); and

(2) viewed the contested material (such as the videotaped or DVD copies of the cable television programming alleged to be obscene, contemporaneously lodged with the complaint at the time of its filing, and pleaded by incorporation in this case).

Instead, in this case both the trial court and the appellate court refused to review the material alleged to be obscene, and, in adjudicating and reviewing the propriety of the demurrer, refused to apply federal constitutional obscenity standards to petitioner's complaint, as required.

III. THE QUESTIONS ARE RIPE FOR REVIEW

Federal obscenity law controls here. Only action by this Court can correct and provide a remedy for the serious violations of federal constitutional and statutory law presented by this Record. Action by this Court will provide important guidance to consumers, the business community, and law enforcement with respect to the how federal obscenity law is to be applied the cable television environment.

Congress has completely banned the transmission of obscene cable television programming – yet very few plaintiffs have been brave enough to undertake court action in an attempt to ensure that federal law is followed. This may explain why the rate of compensation demanded by the cable operator to carry the "Adults Only" programming has proved to be so financially remunerative for the cable operator. Reportedly, in the past, as much as 80 to 90% of what the customer pays-per-view has been retained by the cable

operator.

Consumers have a right to complain about the crass nature of illegal pornographic materials, and its potential societal effects. A 1997 study (E. Oddone-Paolucci, M. Genius, and C. Violato) [8/] indicates pornography influences violence and family functioning: "While likely not a solitary influence, it appears that exposure to pornography is one important factor which contributes directly to the development of sexually dysfunctional attitudes and behaviors," placing individuals:

> **(1)** at increased risk for developing sexually deviant tendencies (*i.e.* non-normative sexual behaviors such as early age of first intercourse),
>
> **(2)** at increased risk for committing sexual offenses,
>
> **(3)** at increased risk for experiencing difficulties in intimate relationships (involving perceptions of dominance, submission, courtship, sex role stereotyping, or viewing persons as sexual objects), and
>
> **(4)** at increased risk for accepting the "rape myth" (*i.e.* Women cause rape/rapists are normal/ etc.).

In recent years, the medical profession has identified an increase in activities that may result in severe dependency or addictive behaviors, and has added "sexual addiction" to sexually explicit pornographic materials [9/] to the list of other deleterious

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[8/] E. Oddone-Paolucci, M. Genius, and C. Violato, "**A Meta-analysis of the Published Research on the Effects of Pornography**," Medicine, Mind and Adolescence, Vol. XII, no. 1-2, pp 101-112 (1997). Copyright 1997.

[9/] Today, the widespread dissemination of illegal Internet pornography raises a number of substantial social concerns. See, for example, Victor B. Cline, Ph.D., "**Pornography's Effects on Adults and Children**," (visited February 15, 2005) < http://www.moralityinmedia.org > in which Dr. Cline

conditions, such as addiction to gambling, alcohol, and other drugs. [10/] It is tragic to note that most of those "addicted" started off as "consenting adults." [11/]

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describes how pornography can destroy certain individuals. The author draws upon concrete examples, some of which are taken from his clinical practice. He identifies and discusses a progressive four-step pattern consisting of: (1) addiction, (2) escalation, (3) desensitization, and (4) acting out sexually. See also "**Treatment and Healing of Sexual and Pornographic Addictions**," (visited February 5, 2005) < http://www.moralityinmedia.org > in which Dr. Cline describes strategies useful in treating sexual addicts, particularly those addicted to pornography.

Researchers continue to study the negative effect of pornographic imagery on the brain and on behavior. As has been observed elsewhere, the brain is an incredibly complex and powerful system. Sophisticated medical diagnostic techniques confirm that images override text for brain dominance and research indicates that a pornographic environment "colonizes" in a viewer's brain, producing structural changes in the brain that are involuntary and can last for years. See Dr. Judith A. Reisman, "**Psychopharmacology of Pictorial Pornography Restructuring Brain, Mind and Memory and Subverting Freedom of Speech**", < http://www.drjudithreisman.com/brain.pdf > (visited February 5, 2005).

[10/] In ***Phalen v. Commonwealth of Virginia***, 49 U.S. 163 at 168 (1850), this Court observed:

> ". . . . The suppression of nuisances injurious to public health or morality is among the most important duties of government. Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the wide spread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple.
>
> "It is a principle of the common law, that the king cannot sanction a nuisance. . . ."

[11/] Federal law completely bans the cable television transmission of obscene pornographic material for all audiences (*i.e.*, it is illegal for both children and adults, including "consenting adults"). Under the so-called "***Miller* Test**," obscenity is pornographic material in which, taken as a whole,

CONCLUSION

Obscenity, by definition, is a patently offensive appeal to a prurient interest in sex and has no serious literary, artistic, political, or scientific value. [12/] Obscene cable television programming objectifies and crassly exploits human sexuality, is not protected by the **First Amendment**, and under federal law is and should continue to be completely banned.

The miscarriage of justice demonstrated by this Record is serious, but of even more concern is the effect that the open flaunting of federal law by the non-stop transmission of obscene material has had, and will continue to have on society, and its business community – which will continue unabated, unless stopped by this Court taking action in this case.

Dated: February 15, 2005 Respectfully submitted,

Carol A. Clancy

Carol A. Clancy
Counsel of Record
9055 La Tuna Canyon Road
La Tuna Canyon, California 91352

---

the following three essential elements coalesce or come together:

> **(a)** prurient appeal (*i.e.*, an erotic, shameful or morbid attraction to nudity, sex, or excretion);
>
> **(b)** sexual conduct (patently offensive representations or depictions of actual or simulated sexual conduct, including lewd exhibition of the genitals);
>
> **(c)** lack of literary, artistic, political, or scientific value.

[12/] ***Reno v. ACLU***, 521 U.S. 844, at 877, footnote 44 (1997); ***Miller v. California***, 413 U.S. 15 (1973); ***Roth v. United States***, 354 U.S. 476 (1957).

CERTIFICATE OF SERVICE

I, James J. Clancy, a member of the Bar of this Court, hereby certify that on this 15TH day of February, 2005, three copies of the within:

PETITION FOR A WRIT OF CERTIORARI

in the above entitled case were deposited in the U.S. Post Office with Priority Mail postage prepaid, and properly addressed to the below listed parties to the proceedings. I further certify that all parties required to be served have been served:

Clerk, Civil Filing
California Supreme Court
300 South Spring Street
Los Angeles, California 90013

Clerk, Civil Filing
California Court of Appeal
2nd Appellate District, Div. 1
300 South Spring Street
Los Angeles, California 90013

Clerk, Civil Filing
Hon. Michael B. Harwin, Dept. M
L.A. Superior Court, N.W. Div.
6230 Sylmar Avenue
Van Nuys, California 91401

Bill Lockyer
California Attorney General
Public Inquiry Unit
P.O. Box 94425
Sacramento, California 94244-2550
Re: **Unfair Competition Case. (See Bus.& Prof. Code, §17209, and Cal. Rules of Court, Rule 15(e)(2).)**

Paul J. Cambria, Jr., Esq.
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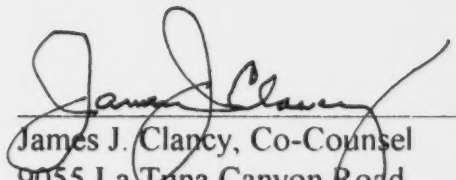
Attorney of Record for ***A.T.&T. Corp., a New York Corporation*** (L.A.C.Sup.Ct.No. LC062475, CoA.No.**B168827**).

The Hot Network, ***The Hot Zone***, ***Vivid Video***, ***Vivid Entertainment Group***, ***Playboy Enterprises, Inc.***, ***Christie Hefner***, ***Playboy Entertainment Group*** (as ***Doe 3***) (L.A.C.Sup.Ct.No. LC062475, CoA.No.**B166374**).

Comcast Corp., a Pennsylvania Corporation (as ***Doe 4***), and ***Comcast of California VII, Inc., a Washington Corporation*** (as ***Doe 5***) (L.A.C.Sup.Ct.No. LC062475, CoA.No.**B171529**).

Dated: **February 15, 2005**



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APPENDIX A

ORDER OF THE CALIFORNIA SUPREME COURT DENYING A HEARING IN B168827

(Reference: *Petition for A Writ of Certiorari*, page 2.)

JAMES J. CLANCY, Plaintiff and Appellant, v. AT&T CORPORATION, Defendant and Respondent.

S128491

SUPREME COURT OF CALIFORNIA

2004 Cal. LEXIS 11184; 2004 Daily Journal DAR 13952

November 17, 2004, Filed

PRIOR HISTORY: [*1] Second Appellate District, Division One, No. B168827.

JUDGES: Brown, J., was absent and did not participate.

OPINION: Petition for review & publication request denied.

Brown, J., was absent and did not participate.

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APPENDIX B

ORDER OF THE CALIFORNIA SUPREME COURT DENYING A HEARING IN B171529

(Reference: *Petition for A Writ of Certiorari*, page 2.)

JAMES J. CLANCY, Plaintiff and Appellant, v. COMCAST CORPORATION ET AL., Defendants and Respondents.

S128468

SUPREME COURT OF CALIFORNIA

2004 Cal. LEXIS 11183; 2004 Daily Journal DAR 13952

November 17, 2004, Filed

PRIOR HISTORY: [*1] Second Appellate District, Division One, No. B171529.

JUDGES: Brown, J., was absent and did not participate.

OPINION: Petition for review & publication request denied.

Brown, J., was absent and did not participate.

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APPENDIX C

THE OPINION OF THE CALIFORNIA COURT OF APPEAL IN B168827, 2004 Cal. App. Unpub. LEXIS 7996 (August 31, 2004, filed)

(Reference: *Petition for A Writ of Certiorari*, page 2.)

JAMES J. CLANCY, Plaintiff and Appellant, v. AT&T CORP., Defendant and Respondent.

B168827

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION ONE

2004 Cal. App. Unpub. LEXIS 7996

August 31, 2004, Filed

NOTICE: [*1] NOT TO BE PUBLISHED IN OFFICIAL REPORTS. CALIFORNIA. RULES OF COURT, RULE 977(a), PROHIBIT COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 977(B). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF RULE 977.

PRIOR HISTORY: APPEAL from an order of the Superior Court of Los Angeles County, No. LC062475. Michael B. Harwin, Judge. DISPOSITION: Affirmed.

COUNSEL: James J. Clancy, *in pro. per.*, for Plaintiff and Appellant; Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria and Paul J.Cambria, Jr.; Labowe, Labowe & Hoffman and Mark S. Hoffman for Defendant and Respondent.

JUDGES: SPENCER, P.J.; ORTEGA, J., MALLANO, J. Concurred.

OPINION BY: SPENCER

OPINION:

INTRODUCTION

Plaintiff James J. Clancy appeals from an order of dismissal entered after the trial court sustained without leave to amend the demurrer of defendant AT&T Corp. and denied plaintiff's *ex parte* motion to file a supplemental complaint. This is plaintiff's second appeal in this action. He previously appealed from dismissals in favor of the other defendants in this action, following the sustaining of their demurrers without [*2] leave to amend. We affirmed those orders of dismissal. (*Clancy v. The Hot Network* (Jan. 29, 2004, B166374) [nonpub. opn.].) The Supreme Court denied review of our decision on April 14, 2004, S123214.

A third appeal from a dismissal in favor of other defendants in this action also is before this court. (Clancy v. Comcast Corporation, B171529.) In these appeals, which we consider concurrently, we again affirm the orders of dismissal.

FACTS

Plaintiff is an attorney, licensed to practice in the State of California, who lives in Sun Valley, in the City and County of Los Angeles. He has 38 years of experience, specializing in obscenity litigation.

Plaintiff receives cable television service from defendant AT&T Corp. (AT&T). n1 Broadcast on cable channels 96 (analog), 457 and 459 (digital) are "In Demand, Pay Per View, Adults Only" programs. These included *101 Cheerleaders & 1 Jock*, *Hell on Heels*, and *More Than a Handful 9*, broadcast between January 27 and April 30, 2001. AT&T broadcasts adult films and previews 24 hours a day. It charges $ 11.95 for receipt of a three-hour segment of the broadcasts, including two 75-minute films and two 15-minute previews. [*3]

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n1 Plaintiff initially named American Telephone and Telegraph, Inc.

as a defendant. He later amended his complaint to name AT&T Corp.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

On January 27, 2001, plaintiff paid $ 11.95 to AT&T for "In Demand, Pay Per View, Adults Only" programs. AT&T broadcast into his home five adult motion pictures and additional previews. The previews advertised motion pictures produced by Vivid Entertainment Group, The Hot Zone and The Hot Network. n2 The previews advertised the motion pictures as containing "real, live, all-American sex-not simulated by actors."

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n2 Vivid Entertainment Group, The Hot Zone and The Hot Network were defendants below and parties to the previous appeal.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

Plaintiff began recording AT&T's "In Demand, Pay Per View, Adults Only" programs on a daily basis. Over 93 days-through May 1, 2001-he recorded 460 adult motion pictures broadcast [*4] on analog channel 96, including 121 different titles. From these recordings, he constructed time and motion studies regarding the depictions of sexual conduct in the motion pictures. From May 2, 2001 through August 5, 2001, plaintiff purchased and recorded adult motion pictures broadcast by AT&T on digital channel 457.

On June 30, 2001, Playboy Enterprises, Inc. (Playboy) announced that it had exercised its option to purchase the three fastest-growing adult television channels from defendant Vivid Video: Vivid T.V., The Hot Network and The Hot Zone. The option was owned and exercised by Playboy and Christie Hefner. The Hot Network, The Hot Zone, Vivid Video and Vivid Entertainment Group supplied adult programming to AT&T. n3

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n3 Playboy, Christie Hefner and Vivid Video were defendants below and parties to the previous appeal.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

James Hahn, Rocky Delgadillo and Los Angeles City Council (City) and Steve Cooley, Lloyd W. Pellman and Los Angeles County Board of Supervisors (County) have refused to acknowledge AT&T's [*5] broadcasts as an unlawful business practice and a public nuisance. They have failed to address AT&T's practices or abate those practices as a public nuisance. The County refused to file a civil proceeding against AT&T to stop the broadcasts after plaintiff requested that they do so. n4

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n4 The City and County also were defendants below and parties to the previous appeal.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

PROCEDURAL BACKGROUND

Plaintiff filed this action on October 4, 2002. He filed it in his own name, acting as a private attorney general. He identified his complaint as a "complaint in equity for: (1) a declaratory judgment; (2) the issuance of a specifically crafted 'emergency' rule nisi, order to show cause[n5]; (3) a partial summary judgment on that part of plaintiff's verified pleadings which are enhanced by autoptical proferences[n6]; (4) an accounting and forfeiture of unlawful profits; and (5) costs including attorney's fee . . . ."

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n5 A rule nisi is essentially an order to show cause. It is "[a] rule which will become imperative and final unless cause be shown

against it. This rule commands the party to show cause why he should not be compelled to do the act required, or why the object of the rule should not be enforced." (Black's Law Dict. (5th ed. 1979) p. 1196.) [*6]

n6 Autoptic proference is defined as "proffering or presenting in open court of articles for observation or inspection of the tribunal."

(Black's Law Dict., supra, p. 123.) In this case, the autoptic proferences "enhancing" plaintiff's complaint were videotapes of AT&T's broadcasts and time and motion studies of several of the films broadcast.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Specifically, plaintiff sought a declaration that AT&T could not assert as a defense that its broadcasts were made to consenting adults; that AT&T's broadcasts were unlawful per se hardcore pornography and constituted moral public nuisances and contraband. He sought the issuance of an order to show cause why AT&T should not be required to cease broadcasting hardcore pornography to consenting adult viewers. He sought a partial summary judgment on the pleadings as to the films depicted in the autoptic proferences incorporated in the complaint. He sought an accounting and forfeiture of At&T's unlawful profits derived from the broadcast of hardcore pornography between October 20, 2000 and October 2, 2002. Finally, he sought attorney's fees and costs. [*7] On page 32 of his complaint, plaintiff included a section titled "petition for writ of mandamus to abate public nuisances." Named in this cause of action were AT&T, for broadcasting hardcore pornography; The Hot Network, The Hot Zone, Vivid Video, Inc. and Vivid Entertainment Group, for supplying the hardcore pornography; Playboy and Christie Hefner, for owning and exercising the right to purchase The Hot Network, The Hot Zone and Vivid T.V.; and the City and County, for failing

and neglecting to abate public nuisances consisting of the broadcasts of hardcore pornography.

As part of this cause of action, plaintiff claimed he had standing to file a civil lawsuit to terminate AT&T's unlawful business practices under Business and Professions Code section 17200, to revoke their cable franchise, and to terminate a public and private nuisance. He also claimed entitlement to restitution of the money he spent to receive and record AT&T's broadcasts, plus punitive damages and attorney's fees. He claimed an additional right to file a class action lawsuit on behalf of other paying subscribers to AT&T broadcasts.

The City and County demurred on a number of grounds, [*8] including that they could not be compelled to take discretionary actions to abate a nuisance or to terminate cable transmission franchise contracts. The Hot Network, The Hot Zone, Vivid Video, Inc., Vivid Entertainment Group, Playboy Enterprises, Inc. and Christie Hefner also demurred on a number of grounds, including plaintiff's failure to state a cause of action and lack of standing.

AT&T demurred n7 on the grounds plaintiff failed to state causes of action against it for abatement of a public nuisance or for violation of Business and Professions Code section 17200. It also claimed plaintiff lacked standing to bring the action and his entire complaint was uncertain, ambiguous and unintelligible.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n7 AT&T Broadband filed the demurrer, noting it erroneously was sued as American Telephone and Telegraph, Inc.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Plaintiff opposed the demurrers. In opposition to AT&T's demurrer, he claimed that he had stated a cause of action, in that the three videotapes named in his complaint constituted [*9] obscenity

per se. As part of his opposition to the demurrer, he requested that the court take judicial notice of a portion of the Congressional Record dealing with the historical background of obscenity. Plaintiff also moved to amend his complaint to include as defendants AT&T Broadband, AT&T Corp. and Comcast Corp., as the entities responsible under the cable transmission franchise agreements for servicing the area in which plaintiff resided.

At the January 28, 2003 hearing on the demurrers, the trial court sustained all demurrers without leave to amend. It denied plaintiff's motion for leave to amend his complaint. It also denied his ex parte application for leave to make a video demonstration, finding "such a demonstration is not necessary for the purpose of these hearings." The trial court thereafter dismissed the action.

Plaintiff moved for reconsideration of the trial court's rulings. On March 17, 2003, the trial court granted the motion as to AT&T only, "due to service/identity issues."

AT&T subsequently filed a new demurrer. Plaintiff opposed it and, in addition, filed an ex parte motion for leave to file a supplemental complaint adding facts pertaining to Comcast Corp. [*10] , as AT&T's successor in interest. He also filed amendments to the complaint naming Comcast Corp. and Comcast of California VII, Inc. as Doe defendants.

The trial court sustained AT&T's demurrer without leave to amend and denied plaintiff's ex parte motion for leave to file a supplemental complaint. On May 14, 2003, it dismissed the action as to AT&T.

CONTENTIONS

In his brief, plaintiff sets forth 10 separate contentions. Most of these are the same as the contentions he raised in the previous appeal.

One of plaintiff's stated goals in this appeal is to have us

vacate our previous opinion and reconsider the issues he raised at that time. That opinion is now final, however, and we have no jurisdiction to vacate it and reconsider the issues raised therein. (Cal. Rules of Court, rule 24; *Ellenberger v. City of Oakland* (1946) 76 Cal. App. 2d 828, 830.)

Additionally, some of plaintiff's contentions relate to orders from which this appeal was not taken and defendants who are not parties to this appeal. We have no jurisdiction to consider them. (*Polster, Inc. v. Swing* (1985) 164 Cal. App. 3d 427, 436, 210 Cal. Rptr. 567.) [*11]

Plaintiff first contends that the performance of patently offensive representations of ultimate sexual acts, actual or simulated, in public, constitutes obscenity per se. As such, it is both a fraudulent business practice and a moral public nuisance. We need not address this contention, in that we conclude the trial court properly sustained defendant's demurrer without leave to amend and dismissed the action based on plaintiff's failure to state a cause of action against defendant AT&T.

Plaintiff further contends his complaint sets forth facts establishing desuetude with respect to obscenity law, states causes of action and standing by plaintiff as a private attorney general against defendant.

It "contemplates that plaintiff, as a private attorney general, will prosecute these causes of action to their conclusion in this civil moral public nuisance abatement action." We disagree. Plaintiff's complaint does not state causes of action against defendant and he has no standing to bring this action as a private attorney general.

Plaintiff asserts that the trial court, under the separation of powers doctrine, had the duty under the state and federal constitutions to examine his time and [*12] motion studies and to consider his standing to assume the role of a private attorney general pursuant to constitutional and statutory provisions of California law. The trial court's failure to fulfill its duty, he claims, violated his

rights to due process of law under the state and federal constitutions. We do not address this contention for the reasons stated above.

Plaintiff additionally asserts that defendant is responsible for the creation and maintenance of a public nuisance and for unfair competition, thus making the trial court's failure to follow controlling precedent on this issue and to apply the rule of stare decisis reversible error. We do not address the court's asserted failure.

Plaintiff avers the orders denying him a hearing on the issue of obscenity *per se* must be reversed, in that the trial court failed to follow controlling precedent articulated by Division Three of the Second District Court of Appeal. Plaintiff does not identify the orders to which he refers. To the extent they are orders other than the one from which he appealed, we have no jurisdiction to consider this contention. (*Polster, Inc. v. Swing, supra*, 164 Cal. App. 3d at p. 436.) [*13]

Plaintiff also avers it was plain error for the trial court to sustain defendant's demurrer on the basis of its written arguments, without addressing the material allegations of his verified complaint regarding *per se* obscenity and standing. He further avers that the trial court's failure to address the material factual allegations of his complaint and its refusal to review independently and determine de novo whether the contested material was obscene *per se* was arbitrary, capricious and inexcusable. The trial court's unorthodox procedures have no judicial support and constitute a violation of the doctrines of separation of powers and due process of law. We disagree.

Plaintiff raises two contentions that apply to the City and County only.

Inasmuch as they are not parties to this appeal, we have no jurisdiction to consider these contentions. (Polster, Inc. v. Swing, supra, 164 Cal. App. 3d at p. 436.)

Finally, plaintiff contends defendant's brief has misrepresented the key point in his lawsuit. It is not based solely upon the right of an individual to abate a public nuisance based on injury to real property. Rather, it is brought as a public interest lawsuit [*14] as a private attorney general to abate a public nuisance which affects the entire nation. Again, we disagree.

DISCUSSION

Standard of Review

As in the previous appeal, we are reviewing a dismissal following the sustaining of defendant's demurrer without leave to amend. The only question before us is whether the trial court properly sustained the demurrer and denied leave to amend.

A demurrer tests the sufficiency of the plaintiff's complaint, *i.e.*, whether it states facts sufficient to constitute a cause of action upon which relief may be based. (Code Civ. Proc., § 430.10, subd. (e); *Friedland v. City of Long Beach* (1998) 62 Cal.App.4th 835, 841-842.) In determining whether the complaint states facts sufficient to constitute a cause of action, the trial court may consider all material facts pleaded in the complaint and those arising by reasonable implication therefrom; it may not consider contentions, deductions or conclusions of fact or law. *(Moore v. Conliffe* (1994) 7 Cal.4th 634, 638; *Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790.)

The trial [*15] court also may consider matters of which it may take judicial notice. (Code Civ. Proc., § 430.30, subd. (a); City of *Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 459.) However, it may not consider in making its ruling the available evidence, the plaintiff's ability to prove the allegations in the complaint or other extrinsic matters. (*Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 922, 216 Cal. Rptr. 345; see *City of Atascadero, supra*, at p. 459.)

A demurrer should not be sustained without leave to amend

if the complaint, liberally construed, can state a cause of action under any theory or if there is a reasonable possibility the defect can be cured by amendment. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967; *Jager v. County of Alameda* (1992) 8 Cal.App.4th 294, 297.) The demurrer should be sustained and leave to amend denied only "where the facts are not in dispute, and the nature of the plaintiff's claim is clear, but, under the substantive law, no liability exists. Obviously no amendment would change the result." [*16] (5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 946, p. 403; accord, *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra*, 68 Cal.App.4th at p. 459.)

On appeal, we review the trial court's sustaining of a demurrer without leave to amend de novo, exercising our independent judgment as to whether a cause of action has been stated as a matter of law and applying the abuse of discretion standard in reviewing the trial court's denial of leave to amend. (*Montclair Parkowners Assn. v. City of Montclair, supra*, 76 Cal.App.4th at p. 790; *Hernandez v. City of Pomona* (1996) 49 Cal.App.4th 1492, 1497-1498.) Plaintiff bears the burden of proving the trial court erred in sustaining the demurrer or abused its discretion in denying leave to amend. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc., supra*, 68 Cal.App.4th at p. 459; *Coutin v. Lucas* (1990) 220 Cal. App. 3d 1016, 1020, 270 Cal. Rptr. 93.)

Analysis

Defendant demurred on four separate grounds: the complaint fails to state a cause of action against [*17] defendant for abatement of a public nuisance, it fails to state a cause of action against it for unlawful business practices, plaintiff lacks standing to bring the action, and the complaint is uncertain, ambiguous and unintelligible.

The trial court sustained the demurrer without leave to amend on all of these grounds.

A nuisance is, among other things, "anything which is . . indecent or offensive to the senses." (Civ. Code, § 3479.) "A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." (Id., § 3480.)

There are three remedies for a public nuisance: an indictment or information, a civil action or abatement. (Civ. Code, § 3491.) An indictment or information, of course, may be brought by public authorities only. An action for abatement may be brought "by any public body or officer authorized thereto by law." (Id., § 3494; *People ex rel. Busch v. Projection Room Theater* (1976) 17 Cal.3d 42, 55-56, 130 Cal.Rptr. 328.) "A private person may maintain [*18] an action for a public nuisance, if it is specially injurious to himself, but not otherwise."(Id., § 3493.)

Plaintiff did not allege, nor does he claim that he can allege, that defendant's actions were "specially injurious to himself" (Civ. Code, § 3493), *i.e.*, that they injured him in some manner other than that in which they injured the general public *(Koll-Irvine Center Property Owners Assn. v. County of Orange* (1994) 24 Cal.App.4th 1036, 1040). He therefore cannot state a cause of action for public nuisance.

Plaintiff claims to have standing to bring this action for public nuisance on behalf of the public as a private attorney general under Code of Civil Procedure section 1021.5, *People v. E.W.A.P., Inc.* (1980) 106 Cal. App. 3d 315, 165 Cal. Rptr. 73, and *People ex rel Busch v. Projection Room Theater, supra*, 17 Cal.3d 42. Code of Civil Procedure section 1021.5 permits a court to "award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right [*19] affecting the public interest." It does not, by its terms, confer standing on an individual to bring a civil action to enforce important rights affecting the public interest where standing otherwise does not exist.

People v. E.W.A.P., Inc., supra, involved an action by the Los Angeles City Attorney. (106 Cal. App. 3d at p. 317, fn. 2.) *People ex rel Busch v. Projection Room Theater, supra*, similarly was brought by the Los Angeles County District Attorney and other law enforcement officers. (17 Cal.3d at p. 47.) Neither decision confers standing on a private individual to bring an action on behalf of the public as a private attorney general when governmental officials, who alone have standing to bring such an action, decline to bring the action.

In sum, none of the authorities cited by plaintiff support his claim that he has standing to bring this action as a private attorney general.

Absent standing as an individual or as a private attorney general, he cannot state a cause of action based upon public nuisance. (*Cf. Holmes v. California Nat. Guard* (2001) 90 Cal.App.4th 297, 314-315.)

In order to [*20] state a cause of action for unfair competition, a plaintiff must plead an "unlawful, unfair or fraudulent business act or practice," "unfair, deceptive, untrue or misleading advertising," or a violation of section 17500 et seq. of the Business and Professions Code (Bus. & Prof. Code, § 17200; see *Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 383) which is likely to deceive members of the public (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267).

Plaintiff makes no allegation that members of the public were likely to be deceived by defendant's business practices. To the contrary, he alleges that he paid defendant $ 11.95 for "In Demand, Pay Per View, Adults Only" programs, and he received five adult motion pictures and additional previews. He does not claim to be able to allege a likelihood of public deception. He therefore has not stated, and cannot state, a cause of action for unfair competition. (Ibid.)

Inasmuch as plaintiff failed to state a cause of action against defendant and makes no showing that he could amend his complaint

to do so, the trial court [*21] properly sustained defendant's demurrer without leave to amend and dismissed the action. (*Aubry v. Tri-City Hospital Dist.*, *supra*, 2 Cal.4th at p. 967; *Jager v. County of Alameda*, *supra*, 8 Cal.App.4th at p. 297.) We need not address the remainder of plaintiff's contentions. They are not relevant to our resolution of the issues on appeal.

The order is affirmed.

SPENCER, P.J.

We concur:

ORTEGA, J.
MALLANO, J.

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APPENDIX D

THE OPINION OF THE CALIFORNIA COURT OF APPEAL IN B171529, 2004 Cal. App. Unpub. LEXIS 7998 (August 31, 2004, filed)

(Reference: *Petition for A Writ of Certiorari*, page 2.)

JAMES J. CLANCY, Plaintiff and Appellant, v. COMCAST CORPORATION et al., Defendants and Respondents.

B171529

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION ONE

2004 Cal. App. Unpub. LEXIS 7998

August 31, 2004, Filed

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PRIOR HISTORY: APPEAL from orders of the Superior Court of Los Angeles County, No. LC062475. Michael B. Harwin, Judge.

DISPOSITION: Affirmed in part and dismissed in part.

COUNSEL: James J. Clancy, in pro. per., for Plaintiff and Appellant; Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria and Paul J. Cambria, Jr.; Labowe, Labowe & Hoffman and Mark S. Hoffman for Defendants and Respondents.

JUDGES: SPENCER, P.J. We concur: ORTEGA, J. MALLANO, J.

OPINION BY: SPENCER

OPINION:

INTRODUCTION

Plaintiff James J. Clancy purports to appeal from an order sustaining without leave to amend the demurrers of defendants Comcast Corporation and Comcast of California VII, Inc., denying his request to strike defendants' demurrer, denying his request to examine his time and motion studies and refusing to make specific findings of fact and conclusions of law as to whether he had pleaded standing [*2] to bring this action.

He also purports to appeal from an order denying his motion for reconsideration.

The order sustaining defendants' demurrer without leave to amend is not appealable. (Code Civ. Proc., § 904.1; *Hill v. City of Long Beach* (1995), 33 Cal.App.4th 1684, 1695; *Yancey v. Fink* (1991) 226 Cal. App. 3d 1334, 1342, 277 Cal. Rptr. 415.) An appeal may be taken only from the subsequent order or judgment of dismissal. (Hill, supra, at p. 1695; *Yancey, supra,* at p. 1342.) We deem plaintiff's appeal to have been taken from the subsequent order of dismissal.

An order denying reconsideration is not appealable. (Code Civ. Proc. § 904.1; *Estate of Simoncini* (1991) 229 Cal. App. 3d 881, 891, 280 Cal. Rptr. 393; *Rojes v. Riverside General Hospital* (1988) 203 Cal. App. 3d 1151, 1160, 250 Cal. Rptr. 435, disapproved on other grounds in *Passavanti v. Williams* (1990) 225 Cal. App. 3d 1602, 1605, 275 Cal. Rptr. 887.) Insofar as plaintiff purports to appeal from this nonappealable order, his appeal must be dismissed. (*Rossi v. Caire* (1922) 189 Cal. 507, 508; [*3] Lavrischeff v. Blumer (1978) 77 Cal. App. 3d 406, 410, 143 Cal. Rptr. 567.)

This is plaintiff's third appeal in this action. He previously appealed from dismissals in favor of the other defendants in this action, following the sustaining of their demurrers without leave to amend. In his first appeal, we affirmed those orders of dismissal. (*Clancy v. The Hot Network* (Jan. 29, 2004, B166374) [nonpub.

opn.].) The Supreme Court denied review of our decision on April 14, 2004, S123214. In the second appeal (*Clancy v. AT&T Corp.*, B168827) and this appeal, which we are considering concurrently, we again affirm the orders of dismissal.

FACTUAL AND PROCEDURAL BACKGROUND

The facts and the majority of the procedural background pertinent to this appeal are set forth in the opinion on plaintiff's second appeal, *Clancy v. AT&T Corp.*, *supra*, B168827, at pages 2 through 6. We need not repeat them here. The additional procedural background leading up to this appeal is set forth below:

After being named as Doe defendants, Comcast Corporation and Comcast of California VII, Inc. (collectively Comcast) filed a demurrer to plaintiff's complaint. The grounds [*4] were the same as those on which AT&T filed its demurrer: plaintiff failed to state causes of action against it for abatement of a public nuisance or for violation of Business and Professions Code section 17200, plaintiff lacked standing to bring the action and his entire complaint was uncertain, ambiguous and unintelligible. Plaintiff opposed the demurrer and moved to strike it on the ground it rested on fraudulent misrepresentations of fact and law. The trial court denied the motion to strike and sustained the demurrer without leave to amend. Thereafter, it dismissed the action as to Comcast.

Plaintiff moved for reconsideration of the trial court's rulings under Code of Civil Procedure section 1008, claiming "new facts were uncovered upon completion of the scheduled hearing, which were not previously available to Plaintiff at the start of the hearing with respect to the duty of the Trial Court, under the Doctrine of Separation of Powers to support, where possible, the State and Federal Obscenity Statutes enacted by the California State Legislature, and the U.S. Congress, and their application as a means of judicially abating [*5] Moral Public Nuisances." The trial court denied this motion.

DISCUSSION

In his brief, plaintiff sets forth the same 10 contentions that he raised in his second appeal. As we state in our opinion on that appeal, to the extent plaintiff is attempting to have us vacate our previous opinion and reconsider the issues he raised at that time, we are without jurisdiction to do so. (*Clancy v. AT&T Corp., supra*, B168827, at pp. 6-7.) We also have no jurisdiction to consider orders from which this appeal was not taken and defendants who are not parties to this appeal. (Id. at p. 7.) Plaintiff also raises a number of contentions that we need not address, in that they are not necessary to our resolution of this appeal. (Id. at pp. 7-8, 12.)

The question before us is whether the trial court properly sustained the demurrer and denied leave to amend. (*Clancy v. AT&T Corp., supra*, B168827, at p. 8.) We must determine whether plaintiff's complaint states facts sufficient to constitute a cause of action upon which relief may be based (Code Civ. Proc., § 430.10, subd. (e); *Friedland v. City of Long Beach* (1998) 62 Cal.App.4th 835, 841-842) [*6] or whether
it can be amended to do so (Aubry v. Tri-City Hospital Dist. (1992) 2 Cal.4th 962, 967; Jager v. County of Alameda (1992) 8 Cal.App.4th 294, 297). Plaintiff bears the burden of proving the trial court erred in sustaining the demurrer or abused its discretion in denying leave to amend. (City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1998) 68 Cal.App.4th 445, 459; Coutin v. Lucas (1990) 220 Cal. App. 3d 1016, 1020, 270 Cal. Rptr. 93.)
As we explain in our opinion in plaintiff's second appeal, plaintiff cannot state a cause of action as a private individual to bring an action to abate a public nuisance. (*Clancy v. AT&T Corp., supra*, B168827, at pp. 10-11, citing Civ. Code, §§ 3491, 3494; *People ex rel. Busch v. Projection Room Theater* (1976) 17 Cal.3d 42, 55-56, 130 Cal. Rptr. 328; *Koll-Irvine Center Property Owners Assn. v. County of Orange* (1994) 24 Cal.App.4th 1036, 1040.) Code of Civil Procedure section 1021.5, *People v. E.W.A.P., Inc.* (1980) 106 Cal. App. 3d 315, 165 Cal.Rptr. 73, [*7] and *People ex rel. Busch v. Projection Room Theater*, supra, 17 Cal.3d 42 do not confer

standing on plaintiff to bring such an action as a private attorney general. (*Clancy v. AT&T Corp., supra*, B168827, at pp. 10-11.) Plaintiff has not demonstrated that he can state a cause of action to abate a public nuisance. (*Ibid.*)

We also explain that plaintiff has not demonstrated that he can state a cause of action for unfair competition. (*Clancy v. AT&T Corp., supra*, B168827, at pp. 11-12.) He does not claim to be able to allege the requisite likelihood of public deception to state such a cause of action. (*Ibid.*, citing *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1267.)

Plaintiff has presented nothing in his briefs on this third appeal which dictates any different result with respect to Comcast. Inasmuch as plaintiff failed to state a cause of action against Comcast and makes no showing that he could amend his complaint to state a cause of action, the trial court properly sustained Comcast's demurrer without leave to amend and dismissed the action. (*Aubry v. Tri-City Hospital Dist., supra*, 2 Cal.4th at p. 967; [*8] *Jager v. County of Alameda, supra*, 8 Cal.App.4th at p. 297.)

The order of dismissal is affirmed. The appeal from the order denying reconsideration is dismissed. Defendants are to recover costs on appeal.

SPENCER, P.J.

We concur:

ORTEGA, J
MALLANO, J.

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